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No. 85-1569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERLE W. DAMERON,
Petitioner,

v.

WASHINGTON MAGAZINE, INC.,
LARRY VAN DYNE and DANIEL RAPOPORT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The court below held that an individual who plays a significant and central role in an important public controversy may be a "limited purpose public figure" constitutionally required to prove actual malice. There are three questions presented for review:*

1. Whether an individual who plays a significant and central role in an important public controversy may be a limited purpose public figure.

2. Whether a public servant holding a position of critical importance to the public is a public official.

3. Whether there is sufficient evidence to permit a jury to find that respondents acted with fault.

*Respondents respectfully reserve the right to argue Questions 2 and 3 in the event certiorari is granted on the first Question.

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, respondents state that the following parties appeared in the United States Court of Appeals for the District of Columbia Circuit:

Merle W. Dameron: an individual with no corporate affiliates;

Larry Van Dyne and Daniel Rapoport: individuals with no corporate affiliates; and,

Washington Magazine, Inc.: a corporation with no subsidiaries or affiliates. It has a parent corporation known as Capital-Gazette Communications, Inc. A substantial minority shareholder of Capital-Gazette Communications, Inc., is Landmark Communications, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Washington Magazine, Inc., Larry Van Dyne, and Daniel Rapoport, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioner, Merle Dameron, brought this action to recover damages for a statement made in an article published in the October, 1982 issue of *The Washingtonian* magazine. The article, "A False Feeling of Security," focused on the January, 1982 crash of an Air Florida jet in Washington, D.C., and upon issues pertaining to airline safety in general.

Dameron filed suit in April of 1983. Respondents later moved for summary judgment, raising the questions presented for review here as well as other issues. On December 21, 1983, Judge Harold H. Greene granted respondents' motion and dismissed the action.

Dameron appealed to the United States Court of Appeals for the District of Columbia Circuit.[1] That court affirmed, holding that he was a "limited purpose public figure" who must plead actual malice.

Although the facts presented by Dameron's complaint are unusual, the legal questions involved are not. The opinion below follows faithfully the well-settled principles set forth by this Court on the public figure doctrine. Moreover, because those principles are well-settled, neither state nor federal courts need further guidance in this area.

FACTS

On January 13, 1982, Air Florida Flight 90 lifted off a runway at Washington's National Airport and crashed a few seconds later into a bridge over the Potomac River, killing 74 persons. The catastrophe raised many significant questions, both about the accident itself and about airline safety generally. Thus, in the spring of 1982, respondents decided

[1]The appeal presented a number of questions—including those raised here—and not just the two issues petitioner claims were raised. The defenses raised in the courts below, in addition to those raised here, included truth and the privilege to report on official proceedings.

to research and write an article about the crash of Flight 90. The article would have a double focus. First, it would study the crash, its causes, and the individuals involved. Second, it would examine issues pertaining to airline safety, including those factors which had often contributed to commercial airline crashes. RE at 334–35.[2]

Research began in April or May and continued throughout the summer until the article was finished in September. RE at 300. The primary responsibility for the research regarding issues on airline safety rested with Daniel Rapoport. RE at 301. He had written previously on airline safety, and he had been an air traffic controller in the Navy. RE at 310, 313.

Rapoport extensively researched the Air Florida crash. He read the transcripts of the hearings and staff reports in addition to reading approximately 30 articles. RE at 301–03, 317. He also read many articles and books about commercial aviation safety. RE at 302, 307, 311, 317, and 326. In addition, he read as many as 20 National Transportation Safety Board (NTSB) reports regarding other crashes. RE at 311, 326. Among the NTSB reports Rapoport reviewed was the one concerning the 1974 crash of a TWA 727 into Mt. Weather. RE at 319. Respondent Larry Van Dyne also devoted considerable effort to research prior to writing. RE at 338–39.

Based upon their intensive research, respondents wrote the article entitled "A False Feeling of Security" which appeared in the October, 1982 issue of *The Washingtonian*. The article spanned thirty pages and 28,000 words. RE at 48–77. In addition to reconstructing the Air Florida crash, the article discussed a number of serious safety issues. These included pilot errors, flaws in airplane design and construction, the safety of National Airport, and the reliability of the air traffic control system at National and elsewhere. In this last section, respondents published the statement which is the subject of this litigation (RE at 58):

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[2]"RE" references are to the Record Excerpts before the Court of Appeals.

> Since then—despite hair-raising talk among controllers about computer malfunctions, fatigue-induced errors, and reports of "near misses" in midair—it is believed that no major crash has been caused solely by controller errors. They have been assigned partial blame in a few accidents, including the 1974 crash of a TWA 727 into Mt. Weather in Virginia upon approach to Dulles (92 fatalities) . . . .

Dameron was employed at the time of the accident by the Federal Aviation Administration as an air traffic controller at Dulles Airport. He was the sole controller on duty responsible for the approach of the TWA 727 which crashed into Mt. Weather. RE at 2. He alleges that the language complained of was understood by readers of *The Washingtonian* to mean that his errors were "partially to blame for the crash . . . ." RE at 3.

Dameron testified at length before the NTSB regarding his actions as the controller responsible for Flight 514. RE at 280–81. The NTSB issued a report that was reviewed by respondents with regard to the Mt. Weather crash. RE at 319–20. Although petitioner would have it otherwise in his statement of the case, a majority of the NTSB found that controller error contributed to the accident.[3] It stated that a contributing factor was:

> The issuance of the approach clearance when the flight was 44 miles from the airport on an unpublished route without clearly defined minimum altitudes . . . .

RE at 83–84, 122.

Dameron admits that he issued the approach clearance referred to and, although he now claims differently, admitted at deposition that his actions were, in the opinion of the Safety Board, a contributing cause of the accident:

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[3] As Judge Greene noted, "[t]he two dissenters were even more emphatic. In their view, substantial responsibility for the accident had to be assigned to the controller's misreading of the appropriate regulations." *Dameron v. Washington Magazine, Inc.*, 575 F. Supp. 1575, 1577 (D.D.C. 1983). Thus, in Judge Greene's view, *all of the NTSB panel* assigned "partial blame" to the controller in the Mt. Weather tragedy; and, therefore, the article "accurately reported the conclusions of the Board." *Id.* (emphasis supplied).

> Q. And isn't it also a fact that the same Board came to the second contributing factor, the fact that you issued an approach clearance when the flight was 44 miles from the airport on an unpublished route without clearly defined minimum altitudes?
>
> A. Yes.
>
> Q. Doesn't that mean, right or wrong, we will not debate, but doesn't it mean that, for whatever reason, for whatever purpose, the National Transportation Safety Board stated that a contributing cause of the accident pertained to you, to your act of either omission or commission?
>
> A. In their opinion, yes.

RE at 296-99. The Board further indicated that neither the pilots nor the controllers fully comprehended the seriousness of their omissions, that neither exercised the highest degree of care and safety, and that the accident could have been avoided had they done so:

> The Board believes that the clearance, under the circumstances, should have included an altitude restriction until the aircraft could reach a segment of the published approach procedure or the issuance of the approach clearance should have been deferred until the flight reached such segment. Therefore, the Safety Board concludes that *the clearance was inadequate and its issuance and acceptance was the result of a misunderstanding between the pilot and the controller.*
>
> * * * *
>
> Whereas the air carriers and the pilots are expected to perform their services with the *highest degree of care and safety, this same high level of performance must be expected from the management of the air traffic control system and the controller.* The instant case provides a classic and tragic example of a pilot and controller who did not fully comprehend the seriousness of the issuance and acceptance of a clearance which was not precise or definitive. The pilot should question a clearance which leaves any doubt as to what course of action should be followed. *The Board also believes that it is*

> *incumbent upon the controller to ascertain beyond a doubt that the terminology of a clearance conveys the intent to the pilot and to question the pilot if there is any doubt that he has understood it and is initiating actions compatible with the intent of the clearance.*

RE at 114, 117–18 (emphasis supplied).

Despite all of that evidence, petitioner now contends that the NTSB did not assign partial blame to controller errors. He also claims that, although the article does not name him, the public recognized him as the person referred to in *The Washingtonian* because of the substantial media coverage of the crash. RE at 282–83. By his own admission, therefore, he is a limited purpose public figure.

The unique facts involved, the uniform body of law on the limited purpose public figure doctrine, the vitality of the doctrine, and the important goals it serves obviate any need for a decision by this Court on the issue of whether Merle Dameron is a limited purpose public figure. Moreover, review is unnecessary because Dameron is a public official, and because he failed to produce any evidence from which a jury could find that respondents acted with fault.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NO NEED FOR ADDITIONAL GUIDANCE BECAUSE THE CLEAR GUIDELINES OF THE LIMITED PURPOSE PUBLIC FIGURE DOCTRINE ARE APPLIED CONSISTENTLY.

The opinion below faithfully follows the clear and well-established guidelines of the limited purpose public figure doctrine. These long-standing guidelines have produced a uniform body of law accurately reflecting the important goals of the doctrine. As a result, substantial predictability now exists in this area of libel despite the many different fact settings which confront the courts.

Heightened media protection is warranted in order to encourage "uninhibited, robust, and wide-open" debate on public issues. *New York Times v. Sullivan*, 376 U.S. 256, 270 (1964). Later decisions extend this protection to discussions of public figures involved in important public controversies. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The goal of promoting open debate on important controversies led to Justice Powell's pronouncement that an otherwise private individual involved in such a controversy might become a public figure "through no purposeful action of his own." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

Anticipating that unique fact settings would arise, *Gertz* deliberately set out "broad rules of general application" to be used by the lower courts in determining the stature of a plaintiff. *Id.* at 343–44. These guidelines have resulted in a uniform body of law on the public figure issue. Although petitioner contends that confusion has resulted, the cases reveal consistency in the standards applied and uniformity in the results. A review by this Court of the public figure doctrine is, therefore, unwarranted.

A. The Lower Courts Have Applied The Limited Purpose Public Figure Doctrine In A Uniform And Proper Manner.

Petitioner claims that the public figure doctrine is riddled with controversy and ambiguity. That claim is false. There are not, as he contends, "four distinct and mutually irreconcilable" interpretations of the doctrine. The courts have not drawn any such categories. Different individuals in different situations have qualified under the *Gertz* guidelines as limited purpose public figures; that these persons may be artificially pigeonholed into different categories does not mean that each category is exclusive of the other. Petitioner's claim, therefore, can be seen for what it is—an attempt to portray chaos where clarity exists.

Significantly, petitioner cites no case to support his claim that the limited purpose public figure doctrine is in disarray. The circuits which have addressed the issue have all adhered to the guidelines established in *Gertz* and followed by the court below.[4] The decisions are harmonious in both theory and application despite their many fact settings. This uniformity precludes the need for additional guidance. Quite noticeably, petitioner cites virtually no authority—judicial or academic—which seriously questions the workability of the *Gertz* principles. All of petitioner's ingenuity cannot conceal the fact that the familiar test announced in *Gertz*, now more than a decade old, simply does not cause problems in application.

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[4]*Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) (individual with important ties to organized crime is a limited public figure); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 106 S.Ct. 182 (1985) (individual connected with drug trafficking and who is subject of federal investigation is a limited public figure); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (chief executive officer of major corporation advocating marketing practices with great impact upon the public is a limited public figure); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir.), *cert. denied*, 440 U.S. 960 (1978) (developer connected with potential fraud involving a locally significant development is a limited public figure); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir.), *cert. denied*, 444 U.S. 931 (1978) (naval officer removed from his command is a limited public figure); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) (principal figure in debate concerning health hazards of flouridated water is a limited public figure); *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (4th Cir.), *cert. denied*, 460 U.S. 1024 (1982) (individual strongly advocating controversial military use of dolphins is a limited public figure).

See also Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 113 (1978); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Ethridge v. North Mississippi Communications, Inc.*, 460 F. Supp. 347 (N.D. Miss. 1978); *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975); *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984).

Even the cases petitioner relies upon are consistent with *Gertz*. *See Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981) (no public controversy where defendant manufactured claims that plaintiff mistreated animals); *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981) (individual with purely administrative duties in election campaign not central to the issues); *Schultz v. Reader's Digest Ass'n, Inc.*, 468 F. Supp. 551 (E.D. Mich. 1979) (acquaintance of Jimmy Hoffa not central to the issue of Hoffa's death).

B. The Decision Below Follows The Guidelines Set Forth In Gertz And Later Cases.

Under the decisions of this and other courts, it matters little whether Dameron voluntarily sought publicity. *Gertz* recognized that in "rare" situations an individual may "become a public figure through no purposeful action of his own." 418 U.S. at 345. An example is *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), in which plaintiff was accused of fixing college football games. Butts was found to be a public figure although he had never mounted a rostrum, had not sought publicity, and had not manufactured the controversy. Nevertheless, the magnitude of the issue and Butts' central role in it justified his status as a public figure.

The decision below rests upon one of those "rare" sets of facts contemplated by *Gertz*. Those unique facts include a public servant in a critical decision-making role who, through his action or inaction, became the principal figure in an important public controversy. Substantial publicity surrounded the crash of Flight 514, and Dameron himself was the subject of extensive publicity and testified at length concerning his activities as controller. By his own admission, the public recognized him as the subject of *The Washingtonian's* reference although the article does not mention him by name. These facts fall squarely within the ambit of *Gertz* and later decisions of this Court.

The decision below also expressly adheres to the public figure analysis set forth in *Gertz*: (1) whether an important public controversy existed; and (2) whether plaintiff played a central part in that controversy. Later decisions have clarified when these two components are satisfied. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979).

Firestone examined the question of whether the divorce of a Palm Beach socialite arose to the level of a "public controversy." Unlike *Butts*, the Firestone divorce was not an issue in which "the public has a justified and important

interest" and that "shapes events in areas of concern to society at large." *Butts*, 388 U.S. at 134, 164. Accordingly, this Court held that Mrs. Firestone's divorce was a matter of mere "interest" to the reading public. 424 U.S. at 454. In other words, the divorce of Mrs. Firestone, unlike the scandal involving Wally Butts, did not justify heightened media protection because it did not affect the public at large. Conversely, air safety greatly affects the public and is precisely the sort of controversy contemplated by *Butts* and *Firestone*.

The companion cases of *Hutchinson* and *Wolston* examined the other requirement of *Gertz*—the significance of an individual's role in a particular public controversy. In *Wolston*, plaintiff was charged with contempt for failing to appear before a grand jury investigating Soviet espionage. Although he was never indicted in connection with the investigation, plaintiff was referred to as a Soviet spy in *Reader's Digest*. He was not a public figure because his role in the espionage issue was "minor." 443 U.S. at 167. Thus, his mere association with the controversy did not automatically result in public figure status. *Id.* Similarly, the plaintiff in *Hutchinson* had not assumed "any role of public prominence" in the issue of government waste since he was merely a research scientist obtaining public grants who was singled out for unproductive work. 443 U.S. at 135. Public figure status, therefore, depends on whether the individual plays a central role in the controversy, as Dameron surely did in the crash of Flight 514.

Under this line of cases, petitioner's involvement in the controversy—voluntary or involuntary—does not lessen his central role in the ever-important issue of airline safety. His is one of those "rare" situations in which the gravity of the issues involved and the individual's important role in them require heightened media protection.

C. The Guidelines Established By This Court And Followed By The Lower Court Do Not Resurrect The "Public Interest" Test.

The unique facts necessary to meet this Court's limited purpose public figure guidelines belie petitioner's contention that "virtually any private citizen" will achieve public figure status. An important public controversy, not mere public interest, is necessary to achieve this status. In *Gertz*, this Court rejected the short-lived "public interest" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42–43 (1971), with the understanding that matters amounting to "public controversies" may still warrant heightened protection. Only matters of controversy, not just interest, receive heightened protection. To warrant that protection, the issue must "shape events in areas of concern to society at large." *Butts*, 388 U.S. at 164. This Court has consistently rejected attempts since *Gertz* to "equate 'public controversy' with all controversies of interest to the public." *Firestone*, 424 U.S. at 454. Petitioner's argument ignores this fundamental lesson.

This Court set forth clear guidelines in *Gertz* and *Firestone* concerning the definition of "public controversy," and the lower courts have applied these guidelines with uniform results. As a result, debate on fundamental issues, the goal of *New York Times*, has been "uninhibited, robust, and wide-open." Additional guidance on this well-understood doctrine is, therefore, unnecessary.

II.

THERE IS NO NEED FOR REVIEW BECAUSE PETITIONER IS A PUBLIC OFFICIAL OF CRITICAL IMPORTANCE TO THE PUBLIC.

A review of the decision below is also unnecessary because petitioner was a public official as well as a public figure. Petitioner achieved this status because of his impor-

tant responsibilities to the public as a government employee in a critical decision-making position. The judgment below was correct because Dameron—as either a public figure or a public official—had to show actual malice.[5]

Dameron fits clearly within this Court's definition of public officials. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), for example, this Court held that a supervisor of a county recreation area and ski resort was a public official. *Rosenblatt* held that the *New York Times* actual malice test encompasses a government servant with a position of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Id.* at 86.

Dameron's position as an air traffic controller employed by the Federal Aviation Administration falls squarely within this definition. The public has "an independent interest" in receiving information and fostering debate about the actions of air traffic controllers whose routine decisions bear directly upon the lives of countless individuals. That need is far greater than an undifferentiated general interest in public employee performance. The First Amendment demands that comment and debate upon such official conduct be free of undue self-censorship.

Dameron's status as a public official is clearly supported by numerous other decisions. Many types of government employees, such as policemen, medical examiners, naval officers, physicians, and tax assessors, have been held to be

[5]Alternatively, if this Court grants certiorari, a review of Dameron's status as a public official is fairly comprised within the public figure determination and is essential to a complete analysis of his status.

Dameron's status as a public official was not addressed substantively by the courts below. The Court of Appeals found it unnecessary to reach the question because it had already concluded that Dameron was required to prove actual malice as a limited public figure. Although the District Court stated that Dameron was not a public official, it did not explain the basis for that statement; Judge Greene merely ruled that "it is not necessary . . . to make a definitive decision on these matters." 575 F. Supp. at 1576.

public officials.[6] This wide variety of public officials reflects judicial perception of the public interest in subjecting to close scrutiny those who can act with the power of government to affect significantly our daily lives. Surely, it can be said of Dameron that "[t]he strong public interest in insuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official." *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981).

Thus, Dameron is a public official and must allege actual malice. He has not done so. The outcome below, therefore, was correct, and this Court should deny certiorari.

III.

THERE IS NO NEED FOR REVIEW BECAUSE A JURY COULD NOT FIND THAT RESPONDENTS ACTED WITH FAULT.

Even if petitioner somehow does not qualify as either a public official or a public figure, a review of the decision below would be improvident. In *Gertz*, this Court held that

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[6]*St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340 (3rd Cir. 1985), *petition for cert. filed*, No. 85–1593 (March 28, 1986) (police patrolman); *Fogus v. Capital Cities Media*, 111 Ill. App.3d 1060, 444 N.E.2d 1100 (1982) (police patrolman); *Hall v. Piedmont Pub. Co.*, 46 N.C. App. 760, 266 S.E.2d 397 (1980) (medical examiner); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir.), *cert. denied*, 444 U.S. 931 (1978) (former commander of a Navy vessel); *Green v. Northern Pub. Co.*, 655 P.2d 736 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983) (physician applying services to inmates); *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977) (tax assessor); *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) (social worker with power to remove child from parents' home).

liability may not be imposed without fault. 418 U.S. at 347. The record is barren of any evidence of fault, a lacuna which precludes the need for review.[7]

There simply is no evidence that respondents lacked a reasonable basis for writing and publishing the passage at issue. The article was accurate. The NTSB found that petitioner's actions contributed to the accident. Dameron admitted this at deposition. Because the article was truthful and accurate, respondents cannot have been negligent.

Despite the obvious accuracy of the article, petitioner now contends that it somehow misconstrues the NTSB findings. Even if the NTSB findings are subject to an alternative interpretation, petitioner still cannot prevail.

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), although an actual malice case, is nonetheless instructive here. This Court held in *Bose* that the publication of "one of a number of possible rational interpretations" of a report may preclude liability. Thus, even if the NTSB Report is capable of more than one reasonable interpretation, respondents cannot be liable for reporting the most obvious of interpretations. As Judge Greene found, the article "accurately reported the conclusions of the Board," 575 F. Supp. at 1577; a jury, therefore, could not find fault.

Not only were respondents without fault in publishing a reasonable interpretation of the NTSB Report, but Dameron failed to adduce any evidence which would permit a jury to find that respondents acted without due care in

[7]Alternatively, if this Court grants certiorari, a review of this question is essential to a complete analysis of this case.

The Court of Appeals held that it "need not reach the question" whether the article was "true as a matter of law." 779 F.2d at 743. Judge Greene, as discussed in note 3, *supra*, stated that the article "accurately reported the conclusions of the Board." 575 F. Supp. at 1577.

any other respect. The record clearly displays the substantial investigation and research that went into the article.[8]

Petitioner failed to produce any evidence of fault by respondents. The courts below did not substantively address this issue only because there were alternative grounds supporting their decisions. This Court should decline to review a result so manifestly correct.

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[8]Petitioner's contention that respondents were at fault in not reporting collateral litigation relating to the crash is wrong. There has been no showing that respondents were aware of the collateral litigation, or that respondents could possibly have found an unpublished memorandum opinion from the Eastern District of Virginia, an opinion captioned under names not directly related to the NTSB investigation. *Brock v. United States*, Civ. No. 77-479-A (E.D. Va. 1977). Any contention that respondents should have been alerted to the collateral litigation through newspaper articles which had appeared years earlier is frivolous.

In any event, the collateral litigation did not, as Dameron claims, exonerate him. Although the unreported opinion of the trial judge stated that there had been no primary negligence by the Government, the reported opinion of the Fourth Circuit expressly found it "unnecessary... to find whether there was any primary negligence on the part of the air traffic controllers at Dulles." *Brock v. United States*, 596 F.2d 93, 94 (4th Cir. 1979). Instead, plaintiffs failed in *Brock* because the contributory negligence of the TWA pilots was, under Virginia law, a complete bar to success on the merits.

Finally, litigation collateral to the crash has no relevance to the question of whether respondents were at fault in reporting the findings contained in the NTSB Report. No matter what the collateral litigation held, the NTSB found—and respondents correctly reported—that Dameron's activities were a contributing cause of the accident.

CONCLUSION

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully Submitted,

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